(8)

No. 97-428

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
JONATHAN D. HACKER
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. TO HOLD THAT A NONMEMBER CANNOT MOUNT A JUDICIAL CHALLENGE TO AN AGENCY FEE IF HE HAS NOT PURSUED THE IMPARTIAL DECISIONMAKING PROCESS ESTABLISHED BY A UNION PURSUANT TO *HUDSON* BEST EFFECTUATES THE PROCEDURAL SYSTEM MANDATED BY THAT DECISION, AND PROPERLY RECONCILES THE COMPETING INTERESTS INVOLVED	4
II. TO HOLD THAT A NONMEMBER CANNOT MOUNT A JUDICIAL CHALLENGE TO AN AGENCY FEE IF HE HAS NOT PURSUED THE IMPARTIAL DECISIONMAKING PROCESS IS NOT TO REQUIRE AN INAPPROPRIATE EXHAUSTION OF REMEDIES	16
A. An Exhaustion Rule Would Be Permissible in This Context	17
B. To Hold that a Union Does Not Violate the First Amendment by Spending the Funds of a Nonmember Who Has Declined to Participate in the Impartial Decisionmaking Process Is Not to Require Exhaustion of Remedies, But Rather Is to Recognize that There Has Been No Constitutional Violation to Remedy	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ..... *passim*
Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987) 13
Bromley v. Michigan Educ. Ass'n-NEA, 82 F.3d 686 (6th Cir. 1996) 15
Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) ..... *passim*
Cox v. New Hampshire, 312 U.S. 563 (1941) 18
Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987) 13
Ellis v. Railway Clerks, 466 U.S. 435 (1984) 7
FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 18
Freedman v. Maryland, 380 U.S. 51 (1965) 18
Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989) 16
Grunwald v. San Bernardino City Unified Sch. Dist., 994 F.2d 1370 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993) 6, 13
Kidwell v. Transportation Comm'ns Int'l Union, 731 F. Supp. 192 (D. Md. 1990), *aff'd on other grounds*, 946 F.2d 293 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) 13
Knight v. Kenai Peninsula Borough Sch. Dist., 1997 WL 751724 (9th Cir. Dec. 8, 1997) 2
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 5, 7, 8, 19
Machinists v. Street, 367 U.S. 740 (1961) ..... *passim*
McCarthy v. Madigan, 503 U.S. 140 (1992) 14, 17
McDonald v. City of West Branch, 466 U.S. 284 (1984) 14, 15
Patsy v. Board of Regents, 457 U.S. 496 (1982) 16, 17
Ping v. National Educ. Ass'n, 870 F.2d 1369 (7th Cir. 1989) 13
Poulos v. New Hampshire, 345 U.S. 395 (1953) 18
Railway Clerks v. Allen, 373 U.S. 113 (1963) 5, 8, 12, 14
Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956) 5

TABLE OF AUTHORITIES—Continued

Page

Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) 18
Weaver v. University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993) 13
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 19

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*
42 U.S.C. § 1983 ..... 13, 14, 16, 17

MISCELLANEOUS

Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 857 (1988) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-428

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed by the National Education Association ("NEA") in support of petitioner Air Line Pilots Association ("ALPA") with the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

NEA is a nationwide employee organization, with a current membership of some 2.3 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated organizations: it has as state affili-

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

ates an organization in each of the 50 states, the District of Columbia, and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges, and universities throughout the United States.

NEA and many of its affiliates are parties to agency shop arrangements that are subject to the procedures prescribed by this Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). To implement *Hudson's* requirements, NEA and many of its affiliates have adopted procedures under which nonmember employees who object to contributing to the costs of certain union activities may present their objections to an impartial decisionmaker—in most cases, as here, an arbitrator selected by the American Arbitration Association.

The question whether an objecting nonmember is free to bypass that procedure and to challenge a proposed agency fee in federal court in the first instance is a recurring issue of great practical importance to NEA and its affiliates. That question recently was decided adversely to NEA and its Alaska affiliates in *Knight v. Kenai Peninsula Borough Sch. Dist.*, 1997 WL 751724, at *9-10 (9th Cir. Dec. 8, 1997), a case in which a petition for certiorari will shortly be filed.

SUMMARY OF THE ARGUMENT

The procedural requirements for the agency shop set forth in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), are the product of a careful balance between the government's interest in promoting stable labor relations through a system of collective bargaining conducted by an exclusive representative financially supported by all employees, and the First Amendment rights of employees who object to the compelled expenditure of their funds for political or ideological activities.

A fair appraisal of the competing interests identified in *Hudson* supports the conclusion that, where a union has

established an impartial decisionmaking procedure to resolve objections to its proposed agency fee, and has established as well an escrow for the funds that are subject to that procedure, an objecting nonmember who has not pursued his objections to the fee through the impartial decisionmaking procedure cannot claim that the union violated the First Amendment by collecting and expending the fee.

That view accords with the nature of the system of procedures mandated by the Court in *Hudson*. The Court there stated that a portion of each objecting nonmember's agency fee, representing all amounts reasonably in dispute, must be placed in escrow *pending the ruling of the impartial decisionmaker*. That system contemplates that all objections will be subject to the impartial decisionmaking procedure, and the various components of the system would not fit together otherwise.

Furthermore, to hold that a nonmember cannot mount a First Amendment challenge to a union fee if he has not availed himself of the impartial decisionmaking process does not harm the nonmember's First Amendment interest as recognized in *Hudson*, because the escrow ensures that the objector's funds will not be spent on ideological activities while the impartial decisionmaking process is pursued. On the other hand, such a holding promotes the important government interest recognized in *Hudson* and in this Court's other agency fee cases, by enabling the union to have reasonably prompt access to funds it needs to execute its collective-bargaining duties without incurring undue expense.

This approach does not transgress the rule that individuals need not exhaust state remedies before proceeding to litigate federal constitutional claims. No state procedure is proposed here; Congress has not expressed any intent concerning exhaustion in this context; and the balance of interests decidedly favors requiring objecting nonmembers to pursue the impartial decisionmaking process. If this

be deemed an "exhaustion of remedies" requirement, the requirement is both permissible and appropriate.

However, properly viewed, to hold that an objecting nonmember who has not pursued the union's impartial decisionmaking procedure cannot mount a First Amendment challenge to the agency fee is *not* to require exhaustion of a nonjudicial remedy for a First Amendment violation. Rather, it is to recognize, in harmony with this Court's approach in other First Amendment cases, that where the government requires persons who seek to exercise certain rights of expression to participate in a reasonable procedure to determine whether the proposed speech will be permitted, and an individual chooses to bypass the mandated procedure, the government's subsequent action in suppressing (or here, compelling) the speech in question simply works no First Amendment violation.

ARGUMENT

I. TO HOLD THAT A NONMEMBER CANNOT MOUNT A JUDICIAL CHALLENGE TO AN AGENCY FEE IF HE HAS NOT PURSUED THE IMPARTIAL DECISIONMAKING PROCESS ESTABLISHED BY A UNION PURSUANT TO *HUDSON* BEST EFFECTUATES THE PROCEDURAL SYSTEM MANDATED BY THAT DECISION, AND PROPERLY RECONCILES THE COMPETING INTERESTS INVOLVED

A.

As in other contexts where the pursuit of important government interests implicates First Amendment concerns,[2] this case calls upon the Court to fashion an accommodation of competing interests.

[2] The case before the Court arises in the private sector, under the Railway Labor Act. The parties and the court below proceeded on the premise that this Court's public sector First Amendment holding in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), is applicable here. For that reason, and because NEA's affiliates are largely public sector unions whose employers are directly subject to the First Amendment, this brief will treat the question presented as a matter of First Amendment law.

On the one hand, an employee has a right under the First Amendment not to be required by government action "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977). *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301-302 (1986).

On the other hand, from its earliest decisions addressing the First Amendment implications of the agency shop,[3] the Court has recognized that the interests of dissenting members of a bargaining unit are not to be protected in a manner that "encroach[es] on the legitimate activities or necessary functions of the unions." *Machinists v. Street*, 367 U.S. 740, 774 (1961). *See also Railway Clerks v. Allen*, 373 U.S. 113, 120, 122 (1963). In particular, since *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), it has been settled that the government may require "financial support of the collective-bargaining agency by all who receive the benefits of its work," *id.* at 238, in order to further "industrial peace and stabilized labor-management relations." *Id.* at 234. *See also Street*, 367 U.S. at 771 ("[R]estraining collection of [agency fees] . . . might well interfere with the appellant unions' performance of those functions and duties which the Rail-

[3] "Under an 'agency shop' arrangement, a union that acts as exclusive bargaining representative may charge nonunion members, who do not have to join the union or pay union dues, a fee [the 'agency fee' or 'service charge'] for acting as their bargaining representative." *Hudson*, 475 U.S. at 303 n.10. Some of the Court's union fee cases have involved an arrangement known as the "union shop." For purposes of the argument in this brief it is not necessary to distinguish between these two types of union security arrangements.

way Labor Act places upon them to attain its goal of stability in the industry.").

In *Abood*, the Court developed more fully the analysis adumbrated in *Hanson*, *Street* and *Allen*, explaining that to require all members of a bargaining unit to contribute financially to the union may properly be viewed as a vital component of "[t]he principle of exclusive representation, which . . . is a central element in the congressional structuring of industrial relations." 431 U.S. at 220. The Court described the government interests that are served by the agency shop as follows:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.
>
> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. See *Street*, 367 U.S., at 760. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . ., union and nonunion," within the relevant unit. *Id.*, at 761. A union-shop arrangement has been thought to distribute fairly the cost

> of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Id. at 220-222 (citations omitted).

Concluding on this basis that the agency shop serves "important government interests," *id.* at 225, the Court held in *Abood* that those interests justify the agency shop in the public sector as well as in the private sector. *Id.* *See also Lehnert*, 500 U.S. at 517 ("[T]he Court [in *Abood*] indicated that the considerations that justify the union shop in the private context—the desirability of labor peace and eliminating 'free riders'—are equally important in the public-sector workplace.").

The Court thus has recognized that, although compelling an employee to provide financial support even for collective bargaining activities implicates First Amendment interests,[4] "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress" or by state or local governments. *Abood*, 431 U.S. at 222. *See also Lehnert*, 500 U.S. at 517 (discussing *Abood*); *Ellis v. Railway Clerks*, 466 U.S. 435, 455-456 (1984) ("It has long been settled that such interference with First Amendment rights [as is entailed by the agency shop] is justified by the governmental interest in industrial peace."); *Hudson*, 475 U.S. at 301 n.8.

Having emphasized that First Amendment challenges to agency fees implicate important government interests, the Court repeatedly has admonished that such challenges

[4] *See Lehnert*, 500 U.S. at 516; *Hudson*, 475 U.S. at 301; *Abood*, 341 U.S. at 222.

must be resolved in a manner that "attain[s] the appropriate reconciliation between majority and dissenting interests . . . [by] protect[ing] both interests to the maximum extent possible without undue impingement of one on the other." *Street*, 367 U.S. at 773. *See also Allen*, 373 U.S. at 122 (stating that even if a union violated the rights of dissenting employees by spending their compelled fees on political activities, "no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining"). As the Court put it in *Abood*, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 431 U.S. at 237.

B.

In *Hudson*, the Court quoted the foregoing passage from *Abood* as stating the "objective" that would guide the Court in fashioning "[p]rocedural safeguards" to "protect[] the basic distinction drawn in *Abood*" between ideological activities, which dissenting employees cannot be required to support, and activities germane to collective bargaining, as to which the important government interests described in *Abood* permit the government to require every employee to contribute equally. *Hudson*, 475 U.S. at 302.[5]

To achieve that objective, the Court devised a balanced, integrated and carefully nuanced system. Before a union may compel any funds from a nonmember, it must provide

[5] We will use the terms "ideological activities" and activities "germane to collective bargaining" as shorthand for the somewhat more complex dichotomy discussed in *Lehnert* between those activities to which objecting nonmembers constitutionally may not be required to contribute financially, and those for which they may be charged.

a notice disclosing expenditure information that a nonmember needs in order to determine whether to object in any respect to the fee the union proposes to charge. *Id.* at 306-307. However, the notice need not be more "exhaustive and detailed" than is practicable for the union. *Id.* at 307 n.18. If the nonmember, having received the union's notice, wishes to prevent the union from spending his money on matters that he believes are not germane to collective bargaining, he has "the burden of raising an objection." *Id.* at 306. *See also Abood*, 431 U.S. at 238; *Street*, 367 U.S. at 774. However, "[t]he nonmember's 'burden' is simply the obligation to make his objection known," *Hudson*, 475 U.S. at 306 n.16; thus the nonmember need not identify the specific expenditures, or even the specific categories of expenditures, to which he objects. *Abood*, 431 U.S. at 241.

Upon receiving an objection, the union must place in escrow "the amounts reasonably in dispute," *Hudson*, 475 U.S. at 310, so as to avoid using objectors' funds even "temporarily for an improper purpose." *Id.* at 305. Although *Hudson* held "that a 100% escrow is not constitutionally required," *id.* at 310, the Court expressly declined to decide how a union could determine "the size of any appropriate [lesser] escrow." *Id.* Given that uncertainty, and the difficulty of defining the amounts "reasonably in dispute" in circumstances where nonmembers have not been required to identify any specific objections, NEA and its affiliates typically escrow substantially more of an objector's fee than is ultimately determined not to be chargeable.[6]

[6] In some circumstances a union may choose to reduce an objector's fee in advance instead of or in addition to an escrow. The interplay between "advance reductions" and escrows need not be explored here. *See generally Grunwald v. San Bernadino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993).

Indeed, no matter how narrowly a union might seek to apply *Hudson*, the decision necessarily requires unions to escrow a significant amount of money that is not in fact the subject of a valid objection, because (i) the universe of "reasonable" objections is by definition broader than the universe of *valid* objections, and (ii) in the absence of any specific statement of the nature and extent of a nonmember's objection, a union must escrow for *every* objector all monies that reasonably may be disputed by *any* objector, even though an individual objector may in reality have an objection to only a small subset of expenditures.[7]

Having required unions to establish an escrow as described, *Hudson* also specified how and when the money is to be releasd from escrow: the Court held that a union must provide to objectors "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute *while such challenges are pending*." *Id.* at 310 (emphasis added).

Thus, *Hudson* contemplates a system in which (i) any nonmember who wishes to oppose the union's use of his or her funds for expenditures described in the union's notice must lodge an objection, (ii) a portion of each objector's fee (generally exceeding the portion that actually is nonchargeable) then will be held in escrow pending a prompt resolution of the objection by the impartial decisionmaker, and (iii) when the impartial decisionmaker has ruled on the objection, the escrow will terminate and the funds that have been held will be distributed.

[7] For example, an employee who objects to contributing to a union's lobbying on *some* issues would not necessarily be opposed to the union's lobbying on every other issue. Thus an employee who favors tax cuts might not want to support a union's efforts to oppose them, but still might fully support the union's lobbying on behalf of worker safety legislation or other matters. So too, an employee who objects generally to contributing to a union's lobbying might not object to supporting other union activities that may not be germane to collective bargaining.

C.

In *Hudson* the Court was not called upon to decide whether a nonmember who does not avail himself of the union's impartial decisionmaking procedure may challenge in court the union's exaction and expenditure of fees. Nor did the Court expressly address that question, with the exception of Justice White and Chief Justice Burger, who stated in a concurring opinion that, "if the union provides for arbitration and complies with the other requirements specified [by the Court in *Hudson*], it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Id.* at 311 (White, J., concurring).

Although the issue was not decided, the opinion of the Court in *Hudson*, fairly read, contemplates that all objectors will proceed through the impartial decisionmaking process established by the union. As we have seen, in describing the escrow procedure that applies to *all objectors*, the Court stated that the escrow must remain in effect while challenges "*before [the] impartial decisionmaker* . . . are pending." *Id.* at 310 (opinion of the Court) (emphasis added). That description contemplates that *all* objections will be resolved by the impartial decisionmaker; and the Court did not describe any *other* mechanism for terminating the escrow of an objector's funds.

If *Hudson* were not understood as we suggest, the various components of the procedural system described by the Court would not fit together. *Hudson* surely does not imply that, if a nonmember prefers litigation to arbitration,[8] the union must escrow the nonmember's funds until the litigation winds its way to conclusion.[9] Indeed, a

[8] We refer to the impartial decisionmaking process as "arbitration" because that is the procedure at issue in this case, and it is the procedure used by NEA and many of its affiliates.

[9] Such a suggestion would be untenable, both because litigation is inherently more protracted than arbitration, and because a non-

nonmember who intends to bypass the arbitration procedure and to proceed solely through litigation should not be entitled to an automatic escrow in the first place. *Cf. Allen*, 373 U.S. at 120 (holding that "dissenting employees . . . can be entitled to no relief until final judgment in their favor is entered," and that until they win such a judgment, "they must pay to the bargaining representative . . . all sums required under the Agreement"). The requirement that a union, having received only a general objection from a nonmember, must establish an escrow to prevent expenditure of the nonmember's money on *any* activity as to which *any* nonmember could raise a "reasonable," even if nonmeritorious, objection, makes sense only if, as *Hudson* indicates, the escrow procedure is linked to an expeditious impartial decisionmaking process through which all objections will be considered.

D.

That interpretation of *Hudson* also best comports with the "objective . . . [of] devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (internal quotation marks omitted).

To require resort to the arbitration process does not interfere with the objective of "preventing compulsory subsidization of ideological activity by employees who object thereto." All money reasonably in dispute is escrowed during the arbitration process; the process is impartial;[10] and, if an objector is dissatisfied with the

member pursuing a judicial challenge to a union fee would have no legal obligation, and often no practical incentive, to proceed expeditiously, whereas a union has both the obligation under *Hudson*, and the practical incentive, to see to it that the arbitration process is "expeditious." *Id.* at 308 n.21.

[10] *Hudson* explicitly requires an impartial decisionmaker. *Id.* at 307-309. Respondents have questioned whether the procedure used by petitioner ALPA, by NEA and many of its affiliates, and by most other unions—*viz.*, utilization of an arbitrator selected by the American Arbitration Association—satisfies *Hudson*'s impartiality requirement. However, *Hudson* itself strongly indicates an affirmative answer to that question, *id.* at 308 n.21, as has every court that has addressed the matter. *See Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1376-77 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-35 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987); *Kidwell v. Transportation Comm'ns Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990), *aff'd on other grounds*, 946 F.2d 283 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

In any event, this question was not raised below and is not encompassed in the grant of certiorari. The question presented here is whether, when a union has provided a decisionmaking process *that complies with* Hudson's *impartiality requirement*, an objector must proceed through that process.

arbitrator's decision, he then may take the matter to court. In the public sector, as the Court observed in *Hudson*, such litigation would take the form of a "*subsequent* § 1983 action" in which "[t]he arbitrator's decision would not receive preclusive effect." *Id.* at 308 n.21 (emphasis added).

On the other hand, the *other* interest that must be taken into account, and "protect[ed] . . . to the maximum extent possible without undue impingement . . . on the other," *Street*, 367 U.S. at 773—the interest in not "restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302—is promoted by requiring objectors to avail themselves of the arbitration process.

If the rule were otherwise, a union would have to proceed to arbitration with respect to those objectors who choose arbitration (because *Hudson requires* unions to provide a nonjudicial procedure, *id.* at 307-308 & n.20), while proceeding at the same time to litigation at the demand of those objectors who wish to bypass the arbi-

tration. This would be the most expensive and burdensome system imaginable, and it would deprive a union of the "time and money" it needs to carry out its "great responsibilities" as exclusive bargaining agent. *Abood*, 431 U.S. at 221.

Under our interpretation of *Hudson*, in contrast, there will be a single impartial forum in which all objections are considered expeditiously and without undue expense. It is to be expected—and NEA's experience confirms—that objectors often will find that the arbitrator's decision satisfactorily resolves their objections. After all, at the time a nonmember notes an objection, he may not have any clear understanding of the law; and, because of the unavoidable limitations on the extent of the information that can practicably be conveyed in a notice, the objector also may be under a misconception as to the nature of the union's actual expenditures and practices. Thus, objections that are asserted upon receipt of a "*Hudson* notice" are, as a class, particularly amenable to resolution through procedures short of formal litigation.

To be sure, in some cases an objector who has submitted his objection to the arbitrator for resolution will be dissatisfied with the arbitrator's decision and will choose, as *Hudson* allows, to pursue a "subsequent § 1983 action." But in most cases, arbitration will prove to be a "more practical alternative[] to litigation for the vindication of the rights and accommodation of interests here involved." *Allen*, 373 U.S. at 124. And what this Court has stated with respect to administrative procedures applies here to arbitration procedures as well: "[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).[11] In all events,

[11] In holding that an agency fee arbitration decision "would not receive preclusive effect in any subsequent § 1983 action," *id.* at 308 n.21, *Hudson* cited the Court's decision in *McDonald v. City of West Branch*, 466 U.S. 284 (1984). It is important to recognize that the description and characterizations of the labor contract arbitration process that appear in *McDonald* do *not* describe the nature of agency fee arbitration, particularly as conducted (in the case at bar, and in the case of NEA) under the American Arbitration Association's Rules for Impartial Determination of Union fees ("AAA Rules"). Unlike labor contract arbitration, *see McDonald*, 466 U.S. at 290-291, the AAA agency fee arbitration system explicitly requires the arbitrator to apply the requirements of federal law. *See* AAA Rules 1 and 3, Joint Appendix (JA) 88. Also unlike labor contract arbitration, *see McDonald*, 466 U.S. at 291, in agency fee arbitration the union does not control the presentation of the objecting nonmembers' case. *See* AAA Rule 2, JA 88 (objectors have party status in the arbitration); AAA Rule 12 ("[t]he arbitrator shall determine how the case can best be presented so that all parties have a fair opportunity to contest the issues"). Finally, although formal rules of evidence and discovery do not apply, *cf. McDonald*, 66 U.S. at 291, AAA Rule 14 gives an agency fee arbitrator the authority to require a union to "produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." JA 90. Particularly when one considers that agency fee challenges turn on objective, ascertainable facts—essentially, the factual component of such a challenge boils down to identifying the activities in which the union has engaged and what it has spent on those activities—and that, under *Hudson*, objectors already have received a notice informing them of the union's expenditures, *see* 475 U.S. at 307 n.18, there is no reason why Rule 14 should not enable objectors to obtain sufficient "discovery." To the extent that the decision in *Bromley v. Michigan Educ. Ass'n-NEA*, 82 F.3d 686 (6th Cir. 1996), may suggest otherwise, the decision is unfounded. In *Bromley*, the objecting nonmembers did not make any unsuccessful request for discovery in the arbitration. Rather, most of them boycotted the arbitration, and, consistent with its usual practice, the National Right to Work Legal Defense Foundation, which provided counsel for the plaintiffs in *Bromley*, declined to provide assistance in the arbitration proceeding, *id.* at 690 n.1, and then, having made no effort to obtain discovery in the arbitration, sought extensive discovery in a subsequent § 1983 action. *Id.* at 688.

because the arbitration is impartial, *see supra* note 10, there is no reason in *any* case for an objector to assume from the outset that only a court, and not the arbitrator, can fairly resolve his objection.

In sum, unless a nonmember's objective is simply to heap expense on a union—an objective that would be facilitated by depriving unions of the right to have objections resolved in an expeditious and inexpensive manner[12]—there is no reason why an objector should wish to bypass the arbitration process and proceed initially in court instead. And, whatever may be an individual objector's motives or perceptions, the dispositive point is that to require resort to arbitration promotes the important interest of enabling unions to collect and expend funds for collective bargaining activities without incurring undue cost and delay, without compromising in the least the objector's interest in not being compelled to subsidize ideological activities.

II. TO HOLD THAT A NONMEMBER CANNOT MOUNT A JUDICIAL CHALLENGE TO AN AGENCY FEE IF HE HAS NOT PURSUED THE IMPARTIAL DECISIONMAKING PROCESS IS NOT TO REQUIRE AN INAPPROPRIATE EXHAUSTION OF REMEDIES

To hold that a nonmember cannot challenge a union's collection or expenditure of fees if he has bypassed the arbitration procedure is not to impose an "exhaustion of remedies" requirement such as would be impermissible in a § 1983 action under *Patsy v. Board of Regents*, 457 U.S. 496 (1982). This is so for two reasons.

---

[12] The potential to use agency fee challenges as a means of crippling unions has not gone unnoticed by the National Right to Work Legal Defense Foundation. *Cf. Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.) (Posner, J.) (stating that the "remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the . . . type of employee" who "wants to weaken and if possible destroy the union"), *cert. denied*, 493 U.S. 917 (1989); *id.* at 1316 ("[T]he plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union.").

A. An Exhaustion Rule Would Be Permissible in This Context

First, *Patsy* holds only that a § 1983 plaintiff need not exhaust "state administrative remedies." *Id.* at 498. *See also id.* at 505 (noting "the belief of the 1871 Congress that the *state authorities* had been unable or unwilling to protect . . . constitutional rights") (emphasis added). The *Hudson* impartial decisionmaking process is not a state administrative remedy; it is a procedure created by and governed by federal law.

Because Congress has not clearly spoken with respect to the matter, if the approach we advocate is properly characterized as one of "exhaustion of remedies," then the question whether to require such exhaustion is to be determined by this Court in accordance with "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. at 144. At least one of the grounds on which courts traditionally have required exhaustion—to "promote[] judicial efficiency," *id.* at 145—plainly is applicable here. If objections must be taken to arbitration, "a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *Id.* "And even where a controversy survives . . . review, exhaustion of the . . . procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* On the other hand, the kinds of circumstances that have been held to weigh against exhaustion—"an unreasonable or indefinite timeframe for . . . action," *id.* at 147, a lack of power to grant effective relief, *id.* at 147-148, or the presence of bias, *id.* at 148—are not presented here. An exhaustion-of-remedies requirement therefore would be consistent with this Court's exhaustion jurisprudence.

B. To Hold that a Union Does Not Violate the First Amendment by Spending the Funds of a Nonmember Who Has Declined to Participate in the Impartial Decisionmaking Process Is Not to Require Exhaustion of Remedies, But Rather Is to Recognize that There Has Been No Constitutional Violation to Remedy

There is a more fundamental reason why the position we advocate is not at odds with *Patsy*'s "no exhaustion" rule: to hold that a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee is *not* to require exhaustion of a remedy for any constitutional violation. Rather, the *Hudson* procedures exist to "avoid the risk" of a constitutional violation in the first place. *Hudson*, 475 U.S. at 305.

The *Hudson* procedures thus serve a function that is closely analogous to procedures the government may require in other First Amendment contexts, such as licensing and the granting of permits. This Court has allowed the government to require would-be speakers to follow reasonable procedures to obtain a license or a permit for certain forms of expression, such as public parades or the exhibition of motion pictures, despite the fact—absent here—that such speech is *suppressed by the government* while such proceedings are conducted. *See, e.g., Cox v. New Hampshire*, 312 U.S. 563 (1941); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).[13] In holding that the government may punish individuals who engage in speech without having availed themselves of the procedure established by the government to determine whether such speech

[13] Because such licensing and permit schemes impose a prior restraint on speech, the Court has held that they must satisfy certain procedural requirements, which may vary with the circumstances. *See, e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990); *Freedman v. Maryland*, 380 U.S. 51 (1965). In the agency fee context, *Hudson* establishes the requisite procedures.

should be permitted, this Court has not reasoned that the speakers failed to exhaust an administrative remedy for a constitutional violation. Rather, the point of the cases is that, where a speaker has declined to participate in a reasonable procedure established by the government to determine whether the speech in question should be permitted or whether legitimate government interests would be best served by denying such permission, the government's refusal to permit the speech *does not violate the First Amendment. See also Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (rejecting claim under Takings and Due Process Clauses on ground that petitioner had not first followed state administrative procedures for reaching final decision on the taking, because "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

Such principles are fully applicable here. *See* Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 857, 881 (1988) (no First Amendment injury accrues unless and until the arbitrator frees the union to spend money over the nonmember's objection). The essence of a cognizable First Amendment claim in the agency fee context is "that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities." *Lehnert*, 500 U.S. at 516. When a union has sent a notice informing a nonmember that it will not spend his funds for any activity the nonmember regards as not germane to collective bargaining unless and until an impartial arbitrator has sustained the union's right to do so, and the nonmember fails to participate in the arbitration simply because he would rather proceed directly to court, the union's action in spending the objector's funds cannot fairly be characterized as "forc[ing]

[the] dissenting employee[] to subsidize ideological activities." Rather, in that circumstance a union has not run afoul of the First Amendment, any more than the government would violate the First Amendment by refusing to allow a parade when the would-be marchers have declined to participate in a reasonable permit process.

For this reason, to require objecting nonmembers to pursue their objections in the first instance through an impartial decisionmaking process not only best effectuates the Court's decision in *Hudson* and the balance of interests that underlies that decision, but is perfectly consistent with this Court's First Amendment jurisprudence in other contexts.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals, and hold that nonmembers who have not presented their objections to the impartial decisionmaker mandated by this Court's opinion in *Hudson* may not mount a judicial challenge to a union's agency fee.

Respectfully submitted,

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
JONATHAN D. HACKER
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340